**PARASURAMAN KUPPAN**

**v.**

**SAZALI MD AKHIR & ANOR**

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
ABDUL MALEK AHMAD JCA
HAIDAR MOHD NOOR JCA
[CIVIL APPEAL NO: K-04-39-97]
10 JULY 1999

***CIVIL PROCEDURE:*** *Judgments and orders - Drawing up of orders - Settlement of dispute over terms - Rules of the Federal Court 1995, r. 3 - Rules of the High Court 1980, O. 42 r. 8(3) & (4)*

This was an appeal by the appellant against an order of the High Court ordering that certain account statements pertaining to moneys deposited in a bank be produced in court.

The appellant had obtained judgment in the Sessions Court, but appealed to the High Court on quantum. The High Court increased the award to include pre-trial loss of income and loss of earning capacity. The respondents' insurance company appealed to the then Supreme Court against the two additional heads of damages. Meanwhile, in allowing the respondents' application for a stay pending appeal, the High Court ordered that the High Court award be paid to the appellant's solicitor and that he disburse the sum under the Sessions Court award to the appellant, keeping the balance in a fixed-deposit account pending appeal.

The respondents' appeal was subsequently allowed. A disagreement then arose between the solicitors regarding the effect of the Supreme Court's order, *ie*, whether the Supreme Court had reversed the High Court's award in totality or only that part relating to pre-trial loss and loss of earning capacity. The respondents' solicitor proceeded to file both his and the appellant's solicitor's draft orders in court, and the registrar approved the former ('the first order').

The respondents' solicitor then purported to execute the first order, demanding the refund of the sum paid with interest and obtained several orders against the appellant's solicitor. Meanwhile, the appellant's solicitor obtained confirmation from the Supreme Court that its order had merely reversed the award pertaining to pre-trial loss and loss of earning capacity ('the amended order').

Nevertheless, the respondents' solicitor applied for and obtained the order presently appealed against, pursuant to O. 24 r. 12 of the Rules of the High Court 1980 ('the RHC'), and an ancillary order referring the appellant's solicitor to the Disciplinary Board for misconduct.

**Held:**

**Per Haidar Mohd Noor JCA**

**[1]** Being aware of the dispute regarding the terms of the Supreme Court order, either solicitor should have applied under r. 3 of the Rules of the Federal Court 1995 and O. 42 r. 8(3) and (4) of the RHC for an appointment before the registrar to settle the terms. However, since the respondents' solicitor was the one who prepared the first order, and knowing of the disagreement, he should have taken the initiative.

**[2]** The amended order settled the issue of the terms of the first order and should have been the end of the matter. There was therefore no necessity for the judge to have made the order under O. 24 of the RHC.

**[3]** Order 24 of the RHC refers to matters begun by writ. As the present matter was an appeal and not a writ action, O. 24 of the RHC was irrelevant. Neither would the court invoke its inherent jurisdiction to hear the application in favour of the party whose solicitor had wrongly invoked the procedure.

**[4]** The amended order had vindicated the appellant's solicitor of any misconduct. The person who should be disciplined should be the respondents' solicitor, whose action could amount to misleading the court.

*[Appeal allowed with costs.]*

**Legislation referred to:**

Legal Profession Act 1976, ss. 94(3)(b), 99(2)
Rules of the High Court 1980, O. 24 rr. 1, 10(1), 12(1), O. 42 rr. 6(1), 8(3), (4)
Rules of the Federal Court 1995, r. 3

*For the appellant - MS Murthi (En Mayandi with him); M/s Mayandi & Panjaram*
*For the respondents - S Visvanathan; M/s Syarikat Visva*

*[Appeal from High Court, Alor Setar; Civil Appeal No: 12-43-1991]*

*Reported by Anne Khoo*

## JUDGMENT

**Haidar Mohd Noor JCA:**

This is an appeal by Parasuraman a/l Kuppan (appellant) against the decision of the Alor Setar High Court given on 4 May 1997 whereby pursuant to an application by Sazali bin Mohd Akhir and Ismail bin Mat Senawi (respondents) by way of a notice to produce (encl 72), the learned judge ordered (p. 37 of the appeal record):

(i) that subject to (ii) below, the request for documents under items (1), (2), (3), (6), (7) and (8) be allowed; and

(ii) that only the documents/statements on the deposit and interest earned until the date of withdrawal for purpose of paying into court be produced.

The application is purportedly made pursuant to O. 24 r. 12 of the Rules of the High Court 1980 ("RHC").

In addition thereto, for the purpose of O. 42 r. 6(1) of RHC the learned judge on 6 July 1997 ordered the solicitors for the appellant to comply with the order of court of 4 May 1997 in respect of the notice to produce (encl 72) within thirty days of the service of the said order.

On the oral complaint of counsel for the respondents, the learned judge also found that the act of Encik Francis Nathar, counsel/solicitor for the appellant, amounted to misconduct within the meaning of s. 94(3)(b) of the Legal Profession Act 1976 ("LPA") and thereby directed his Deputy Registrar to serve a copy of his judgment and do pursuant to s. 99(2) of the LPA refer Encik Francis Nathar to the Disciplinary Board set up under the LPA.

Before considering the issue before us, it would be useful to set out the background facts that led to the orders made by the learned judge.

***Background Facts***

The appellant was the second plaintiff in the Sessions Court at Jitra. He had successfully sued the respondents as defendants in the Sessions Court for damages in a running-down case. The learned Sessions Court judge granted an award of RM25,000 for general damages, RM720 for special damages and costs of RM4,797.60. Being dissatisfied with the award, the appellant appealed to the High Court.

In the High Court, Mohamed Noor Abdullah JC (as he then was) allowed the appeal and gave the following awards to the appellant:

(a) RM33,000 for general damages.

(b) RM6,000 for hip dislocation.

(c) RM8,000 for corrective surgery.

(d) RM5,000 for loss of earning capacity.

(c) RM9,240 for pre trial loss of income.

The respondents in turn, through their solicitors, Tetuan Syarikat Visva, filed an appeal against the judgment of the High Court *vide* Supreme Court Civil Appeal No. 04-32-93.

Pending the determination of Civil Appeal No 04-32-93 by the Supreme Court (subsequently known as the Federal Court), the respondents filed an application for stay of execution of the High Court judgment (encl. 40). The application was heard by Hishamudin Yunus J on 3 December 1994 and it was allowed, subject to the following conditions:

(i) that the total sum due under the High Court judgment be paid to Tetuan Francis Nathar & Co, solicitors for the appellant;

(ii) that Tetuan Francis Nathar & Co. be allowed to disburse to the appellant, the sum due to the appellant under the Sessions Court judgment;

(iii) that the balance, after disbursement to the appellant under (ii), be held by Tetuan Francis Nathar & Co. as stakeholders until the final disposal of Civil Appeal No. 04-32-93; and

(iv) pending the disposal of Civil Appeal No: 04-32-93, this sum of money (disputed amount) was to be kept in a fixed deposit account as part of the client's account to be disbursed together with the interest earned to whichever party the Supreme Court declares to be entitled.

The disputed amount of RM46,707.66 was sent direct to Tetuan Francis Nathar & Co. solicitors for the appellant, by South East Asia Insurance Berhad, the insurance company which had to indemnify the respondents on 20 April 1995 (p. 184 of the appeal record).

The issue in this appeal really is centred on the result of Civil Appeal No. 04-32-93 in the Federal Court *vis-a-vis* condition (iv) imposed by the learned judge. We therefore need to examine the order made by the Federal Court and the subsequent amended order made by the Federal Court.

***Supreme Court Civil Appeal No. 04-32-93***

Both counsel before us were also the counsel before the Federal Court when the Federal Court determined the appeal on 11 July 1995.

We note that at the time of the *ex parte* application for leave to appeal to the Supreme Court by the respondents before Mohamed Noor Abdullah JC (as he then was) it is clear that the question the respondents intended to refer to the Supreme Court was whether the appellant was entitled to get pre-trial loss and loss of earning capacity (see p. 248 of the appeal record). From the notes of the proceedings before the Federal Court on 11 July 1995, this question was confirmed by the Federal Court, that is, "only leave to appeal on pre-trial loss and loss of earning capacity" (see p. 251 of the appeal record). In other words, the issue or question before the Federal Court was whether the High Court was right in allowing the said claims or the Sessions Court was right in rejecting the said claims? The Federal Court ruled that the appellant was not entitled to the said claims and hence allowed the appeal of the respondents as appellants before the Federal Court and affirmed the judgment of the Sessions Court that rejected the said claims. Encik Visvanathan, counsel/solicitor for the respondents, in the circumstances could not possibly argue that the issue or question before the Federal Court was not confined only to pre-trial loss and loss of earning capacity. It was in that context that the respondents as appellants were successful in their appeal in the Federal Court.

However, Encik Visvanathan, as counsel/solicitor for the respondents as appellants when drawing up the draft order of the Federal Court, framed the order, we would say, in general terms. When he sent his draft order to Encik Francis Nathar, counsel/solicitor for the appellant (respondent in the Federal Court) for approval, quite naturally Encik Francis Nathar did not agree with his draft order and prepared his own draft order as he perceived of what was decided by the Federal Court and sent it to Encik Visvanathan. Being aware of the disagreement to the terms of his draft order, instead of applying for an appointment to the Registrar of the Federal Court, as required by the rules of procedure, what Encik Visvanathan did was merely to send his draft order as well as Encik Francis Nathar's draft order to the Registrar of the Federal Court for approval. What Encik Visvanathan did was delinitely wrong in view of r. 3 of the Rules of the Federal Court 1995 and O. 42 r. 8(3) and (4) of RHC:

Rule 3 reads:

> Application of the Rules of the High Court 1980 etc.
>
> 3. Where no other provision is made by any written law or by the Rules, the procedure and practice in the Rules of the Court of Appeal 1994 and the Rules of the High Court 1980 shall apply *mutatis mutandis*.

Rule 8(3) and (4) of O. 42 read:

> (1) ...
>
> (2) ...
>
> (3) In any case where the solicitors concerned are unable to agree upon the draft, any one of them may obtain an appointment before the Registrar, of which notice shall be given to the other, to settle the terms of the judgment or order.
>
> (4) Every judgment or order shall be settled by the Registrar, but in the case of a judgment or order made by a Judge, any party may require the matter in dispute to be referred to the Judge for his determination.
>
> (5) ...

Either Encik Visvanathan or Encik Francis Nathar should have sought an appointment with the judge (in this case the Presiding Judge) for the dispute to be determined. In this case we are of the view that Encik Visvanathan should have taken the initiative as it was he who first prepared the draft order knowing fully well of the disagreement as to the terms of his draft order when Encik Francis Nathar sent his own draft order to him. It was not for the Registrar to resolve the dispute in their absence. Unfortunately the problem was compounded by the Registrar taking upon herself to approve the draft order submitted by Encik Visvanathan and therein lies the root of the problem. We must say here that had counsel complied with the rules pertaining to the terms of the draft order in dispute much of judicial time would not have been wasted in sorting the terms of the order of the Federal Court and the present appeal would thus have been unnecessary.

The sealed copy of the Federal Court order dated 11 July 1995 ("first order") was served on Encik Francis Nathar by Encik Visvanathan *vide* letter dated 17 September 1995 demanding for the refund of RM48,316.47 on the basis that the respondents were successful in setting aside the judgment of the High Court (see p. 218 of the appeal record). Encik Francis Nathar responded *vide* letter dated 20 September 1995 that his client was only entitled to a refund of RM14,240 and interest of 4% per

annum (being RM5,000 for loss of earning capacity and RM9,240 being loss of pre trial income). Encik Francis Nathar further stated "We are rather bemused by your blunt request to us to forward the sum of RM48,316.47 without any deduction whatsoever (despite the order of court) and without any reference or explanation as to whether or how your client is going to pay to us the sum for general damages plus interest awarded by the High Court and which award was upheld by the Supreme Court." (p. 224 of the appeal record).

The first order of the Federal Court reads:

> RAYUAN INI ditetapkan untuk perbicaraan pada hari ini dalam kehadiran Encik S. Visvanathan, peguam bagi pihak perayu-perayu dan Encik Francis Nathar, peguam bagi responden yang dinamakan di atas DAN SETELAH MEMBACA Rekod Rayuan dan Rekod Rayuan Tambahan yang telah difailkan DAN SETELAH MENDENGAR PEGUAM-PEGUAM tersebut MAKA PADA HARI INI DIPERINTAHKAN bahawa rayuan ini dibenarkan DAN SELANJUTNYA DIPERINTAHKAN bahawa tiap-tiap pihak menanggung kos sendiri dalam Rayuan ini sahaja, DAN SELANJUTNYA DIPERINTAHKAN bahawa Perintah Mahkamah yang telah dihakimi di Mahkamah Tinggi Alor Setar dalam Rayuan Sibil No: 12-43-91 pada 21hb Oktober, 1993 diketepikan; DAN AKHIRNYA DIPERINTAHKAN bahawa wang sebanyak RM500 yang dibayar ke dalam Mahkamah sebagai jaminan kos rayuan ini dikembalikan kepada perayu-perayu.

On the refusal of Tetuan Francis Nathar & Co. to comply with the first order of the Federal Court as perceived by Encik Visvanatnan and disagreed to by Encik Francis Nathar, Encik Visvanathan proceeded to file a summons-in-chambers dated 28 January 1996 (encl 57) in the High Court.

***Summons-in-chambers Dated 28 January 1996 (encl 57)***

The material prayers of encl. 57 are:

(1) ...

(2) Peguam Perayu Tetuan Francis Nathar & Co. mematuhi Perintah Mahkamah bertarikh 3 Disember 1994 dan mengembalikan wang sebanyak RM46,707.66 termasuk faedah yang telah didepositkan dalam akaun tetap dalam akaun pelanggan Tetuan Francis Nathar & Co. kepada Tetuan Syarikat Visva, peguam responden-responden.

(3) Peguam Perayu, Tetuan Francis Nathar & Co. kemukakan kepada Timbalan Pendaftar Mahkamah ini dan Tetuan Syarikat Visva akaun pelanggan mengenai wang RM46,707.66 yang telah dikirimkan kepadanya pada 15 April 1995 serta faedah atas itu hingga penyelesaian perintah permohonan ini.

When encl. 57 came for hearing on 20 March 1996, before the learned judge, Encik Francis Nathar in dealing with prayer (2) explained why he refused to refund the full amount to Syarikat Visva. Encik Francis Nathar contended that Encik Visvanathan misinterpreted the first order of the Federal Court and that only the other awards, that is, on loss of earning capacity and pre-trial loss were set aside by the Federal Court. He further intimated to the learned judge that in order to ascertain the true intent of the first order of the Federal Court, he had filed a notice of motion at the Federal Court and it was scheduled for hearing on 1 April 1996. He therefore prayed for an adjournment of the hearing of encl. 57.

The learned judge allowed the adjournment in respect of prayer (2) only to a date after the hearing of the notice of motion by the Federal Court. The learned judge directed the parties to submit in respect of prayer (3) and after hearing the parties, he made the following order:

> ATAS PERMOHONAN Responden-Responden yang dinamakan di atas melalui saman Dalam Kamar (Lampiran 57) bertarikh 28 haribulan Januari, 1996 dalam kehadiran Encik Francis Nathar, peguam bagi pihak perayu dan Encik S Visvanathan, peguam bagi pihak responden-responden DAN SETELAH MEMBACA Afidavit Encik S Visvanathan (Lampiran 58) yang diikrarkan pada 25 haribulan Januari 1996 DAN SETELAH MENDENGAR peguam-peguam tersebut MAKA PADA HARI INI ADALAH DIPERINTAHKAN bahawa Peguam Perayu Tetuan Francis Nathar & Co., kemukakan kepada Timbalan Pendaftar Mahkamah ini dan Tetuan Syarikat Visva pada atau sebelum 27 haribulan Mac 1996 memfail satu afidavit yang kemukakan penyata akaun pelanggan mengenai RM46,707.66 yang telah dikirimkan kepadanya pada 15hb April 1995 serta faedah atas itu DAN SELANJUTNYA DIPERINTAHKAN bahawa permohonan ini mengenai lain-lain hal ditangguhkan untuk sambung bicara pada 14 haribulan Mei, 1996.

Encik Francis Nathar complied with this order of the learned judge on 27 March 1996 by filing an affidavit sworn on 26 March 1996 with the statement of his clients' account (encl. 64). The affidavit is set out in the judgment of the learned judge at pp. 30 to 31 of the appeal record. We need not reproduce it here.

When the parties appeared before the learned judge for submissions in respect of the second prayer of encl. 57 on 2 July 1996, Encik Francis Nathar sought an adjournment for him to file a further affidavit to exhibit the notice and memorandum of appeal filed by the respondents as appellants to the Federal Court and the order of the Sessions Court, the reasons of which we are not clear. It was this juncture that Encik Visvanathan brought to the attention of the learned judge that encl. 64 disclosed that Encik Francis Nathar had released a sum of RM30,934.64

on 21 September 1995 to his client in spite of the order of the High Court as well as the first order of the Federal Court. Encik Visvanathan then urged the learned judge to issue an interim order for the preservation of RM47,587.15 pending the disposal of encl. 57 if the learned judge was minded to grant an adjournment. At the same time Encik Visvanathan informed the learned judge that after receipt of encl. 64, he had filed a notice to produce (encl. 72) requesting further information regarding the accounts.

The learned judge allowed the adjournment on condition that pending the disposal of encl. 57, Messrs Francis Nathar & Co, was to deposit into the court within seven days, the sum of RM47,587.15. Messrs Francis Nathar complied with this order on 9 July 1996. On 15 August 1996, this interim order was, by consent, made final pending the disposal of the motion by the Federal Court.

By the time the parties appeared before the learned judge on 15 September 1996, Encik Francis Nathar submitted that the prayers in encl. 57 had been complied with by him and there was nothing to adjudicate. If Encik Visvanathan felt that the affidavit by Encik Francis Nathar (encl. 64) was insufficient compliance with the order of the learned judge what he needed to do was simply to urge the learned judge to order Encik Francis Nathar to file a further affidavit enclosing the required documents. This he did not do but instead chose to file notice to produce purportedly under O. 24 r. 12 of RHC (encl. 72).

***Encl 72***

The parties took time to complete their submissions on encl. 72. By 15 January 1997 when the learned judge was to deliver the judgment, he was informed by Encik Francis Nathar that the notice of motion was disposed off by the Federal Court on 21 November 1996 and the Federal Court confirmed the terms of its judgment of 11 July 1995 and they were as interpreted by him. The amended order of the Federal Court dated 21 November 1996 reads:

> Rayuan ini ditetapkan untuk perbicaraan pada hari ini dalam kehadiran Encik S Visvanathan, peguam bagi pihak perayu-perayu dan Encik Francis Nathar, peguam bagi responden yang dinamakan di atas DAN **SETELAH MEMBACA** Rekod Rayuan dan Rekod Rayuan Tambahan yang telah difailkan **DAN SETELAH MENDENGAR** peguam-peguam tersebut **MAKA PADA HARI INI DIPERINTAHKAN** bahawa rayuan terhadap awad bagi kerugian pendapatan dan kehilangan keupayaan pendapatan dibenarkan dan perintah Mahkamah Tinggi Alor Setar bertarikh 21 Oktober 1994 diketepikan bagi maksud setakat itu sahaja **DAN SELANJUTNYA DIPERINTAHKAN** bahawa tiap-tiap pihak menanggung kos sendiri dalam Rayuan ini sahaja.

In our view, the amended order settled the issue of the terms of the first order and that would be the end of the matter. The South East Asia Insurance Berhad could get back its money together with whatever interest accrued from the money deposited into the court by Tetuan Francis Nathar & Co, that is, RM5,000 for loss of earning capacity and RM9,240 for the pre-trial loss of income and the balance be refunded to Tetuan Francis Nathar & Co. In the circumstances Encik Francis Nathar submitted that encl. 72 ought to be dismissed, the orders made under encl. 57 be set aside and Encik Visvanathan be personally made liable for all costs incurred as in encl. 57. However, the learned judge held that in view of the amended order of the Federal Court and in the interest of justice he invited further submissions from the parties on encl. 72. On 4 May 1997, the learned judge made the orders that were the subject of the appeal before us.

The issue is whether the learned judge was right to make the orders pursuant to encl. 72 and the ancillary order of referring Encik Francis Nathar to the Disciplinary Board under the LPA for misconduct.

For a start we must reiterate that the learned judge at the time he heard the arguments on encl. 72 was well appraised of the amended order of the Federal Court and that would be the end of the matter. Be that as it may, was Encik Visvanathan correct to proceed with encl. 72 under O. 24 r. 12 of RHC?

Order 24 r. 12 of RHC does not refer to notice to produce as Encik Visvanathan purportedly tried to invoke. The prescribed form for the notice to produce is Form 43 which is under O. 24 r. 10(1). Therefore encl. 72 is not the prescribed form. Order 24 r. 10(1) reads:

> (1) Any party to a cause or matter shall be entitled at any time to serve a notice in Form 43 on any other party in whose pleadings or affidavits reference is made to any document requiring him to produce that document for the inspection of the party giving the notice and to permit him to take copies thereof?

However, O. 24 of RHC refers to matters begin by writ (see O. 24 r. 1). The present matter is an appeal and is not a writ action. Hence O. 24 is irrelevant and misplaced for Encik Visvanathan to invoke. Before us, Encik Visvanathan conceded that he was wrong in proceeding by way of encl. 72 but contended that the Court has inherent jurisdiction to hear it. With respect, we disagreed. Why should the court invoke its inherent jurisdiction in favour of a party whose counsel/solicitor wrongly invoked the procedure and which procedure entailed undue hardship to the opposite party? This issue was raised by Encik Francis Nathar before the learned judge but it was unfortunate that the learned judge did not give due consideration to this substantial procedural issue. (See p. 88 of the appeal record).

On this ground alone, the learned judge should have dismissed encl. 72 and there was no necessity to make a further order pursuant to O. 42 r. 6(1) that the solicitors for the appellant do comply with the order of the court in respect of encl. 72 within 30 days of the service of the said order. As stated earlier on, it would suffice for Encik Visvanathan to get an order from the learned judge for Encik Francis Nathar to file a further affidavit enclosing whatever documents sought by him.

As stated earlier, at the time of making the order in respect of encl. 72, the learned judge was aware of the amended order of the Federal Court which made it abundantly clear as to the terms in which the appeal was allowed and further, encl. 52 was dully complied with pending the motion before the Federal Court, and there was therefore no necessity for the learned judge to make the order in terms of encl. 72 and it should have been dismissed forthwith.

As to the ancillary order of the learned judge in referring Encik Francis Nathar to the Disciplinary Board for misconduct, it is more of the interpretation of the first order of the Federal Court which by the amended order of the Federal Court had vindicated him. Hence, Encik Francis Nathar was not wrong to release the money after the first order of the Federal Court as to what he honesty believed to be the terms of the judgment of the Federal Court and which was confirmed by the amended order. It seemed clear to us that Encik Francis Nathar had not breached the order of the High Court dated 3 December 1994 or the first order of the Federal Court (which was subsequently amended) to warrant for action to be taken for misconduct against him under the LPA. It is not a matter of Encik Francis Nathar questioning the validity of the order or to put it any other way, blatantly breaching the High Court order or the first order of the Federal Court. In our respectful view he should not be faulted and the person who should be pulled up should be Encik Visvanathan who fully knew of the terms of the judgment of the Federal Court for the reasons stated by us earlier. He chose to put up the draft order in general terms so as to benefit the respondents/South East Asia Insurance Berhad, an act which may amount to misleading the court.

For the reasons stated, we allowed the appeal with costs here as well as in the court below. The orders of the learned judge were set aside and the deposit ordered to be refunded.